

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE)	
MEASURABLE COST SAVINGS)	MEMORANDUM OF THE MAINE
DETERMINED BY DIRIGO)	AUTOMOBILE DEALERS
HEALTH FOR THE SECOND)	ASSOCIATION INSURANCE TRUST
ASSESSMENT YEAR)	IN OPPOSITION TO MOTIONS TO
)	SUPPLEMENT THE RECORD
DOCKET NO. INS-06-900)	

NOW COMES the Maine Automobile Dealers Association Insurance Trust (the “Trust”), by and through its undersigned counsel, and, pursuant to the Superintendent’s Procedural Order dated June 15, 2006, submits this consolidated memorandum in opposition to the motions by the Dirigo Health Agency Board of Directors (the “Board”) and by Consumers for Affordable Health Care (“CAHC”) seeking leave to supplement the record.

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ARGUMENT

Not content with the state of the record developed below, the Board and CAHC have filed motions seeking leave to present additional evidence. Specifically, the Board seeks to supplement the record with: (1) additional Medicare Cost Reports (“MCRs”) from eight Maine hospitals; (2) updated DirigoChoice enrollment data; (3) updated DirigoChoice member survey data; (4) updated data regarding a MaineCare expansion; (5) preliminary CON approvals and denials; and (6) perhaps additional testimony from Steven Schramm of Mercer Government Human Services Consulting (“Mercer”). For its part, CAHC also seeks leave to serve an information request upon the Dirigo Health Agency (“DHA”) to obtain, and to supplement the record with, a report or analysis (the “CMAD Report”) that supposedly undercuts the use of a three-year median rate of growth in the calculation of CMAD in Chamber Exhibit 21 (Record at 4686-4696).

The motions should be denied.

I. THE ACT DOES NOT PERMIT THE SUPPLEMENTATION OF THE RECORD SOUGHT BY THE BOARD AND CAHC.

Although the Superintendent’s Notice of Pending Proceeding and Hearing dated April 27, 2006, contemplates the limited possibility that the record as developed before the Board may be supplemented with additional evidence, such supplementation is not permitted by the Act.

Under the Dirigo Health Act, 24-A M.R.S.A. § 6901, *et seq.* (the “Act”), the Board was statutorily required to have made its determination of aggregate measurable cost savings (“AMCS”) “not later than April 1st.” See 24-A M.R.S.A. § 6913(1)(A). The Board decided not to do so, and it was necessary for the Trust and the other Intervenors to file an action in the Superior Court in an attempt to require the Board to make its AMCS determination in the time expressly required by statute. (Record at 522-61, 1024-26, 5270-74). The Superior Court

ordered the Board to make its AMCS determination by May 12, and the Board did so following a two-day evidentiary hearing held on May 8 and 10. (Record at 671-79, 4973, 5092, 5130, 5281-5300).

On June 9, 2006, the Board filed with the Superintendent its AMCS determination as required by 24-A M.R.S.A. § 6913(1)(B). The Act requires the Board to include “the supporting information for that determination” with its filing. Id. Within six weeks of the Board’s filing, the Superintendent is required to issue an order approving, in whole or in part, or disapproving the Board’s filing. See 24-A M.R.S.A. § 6913(1)(C). The Superintendent “shall approve the filing upon a determination that the aggregate measurable cost savings filed by the board are reasonably supported by the evidence in the record.” Id.

Thus, as contemplated by the Act, the Superintendent sits in an appellate capacity reviewing the reasonableness of the Board’s AMCS in light of the record developed before the Board. The Act simply does not contemplate the limited appellate review by the Superintendent being used as the vehicle by which a party can augment the factual record on which the Board’s AMCS determination was based.¹

In its motion, CAHC, citing to a transcript of the oral argument held in the Superior Court on April 7, 2006, contends, “the parties to this proceeding explicitly recognized that subsequent to the Board’s determination, additional information would be forthcoming and would be presented to the Superintendent.” (CAHC Motion at 1). However, the Trust has never taken the position that the DHA and CAHC would have a second opportunity to present evidence to

¹ The Trust does not concede that this proceeding is even properly before the Superintendent. Rather, it is the Trust’s position that by failing to make an AMCS determination by the April 1, 2006 deadline expressly set forth in the Act, the Board lost both its right to make such a determination and its ability to assess a savings offset payment.

support their case. In fact, the pages of the hearing transcript cited by CAHC are the remarks of counsel for other Intervenors, taken out of context at that. Moreover, during the first day of the adjudicatory hearing before the Board, counsel for the Trust responded to this very argument advanced by CAHC here:

The last point I would make, we never say, we meaning the trust, in Court it was okay with us if this was augmented down the road at some point in time. Your decision has to be made on a record that's made in this hearing and as far as we're concerned, if the record doesn't support it, *nobody gets to augment anything*.

(Record at 5023) (emphasis added).²

II. NEITHER THE BOARD NOR CAHC HAS MADE THE SHOWING REQUIRED BY THE SUPERINTENDENT.

As noted above, the Superintendent's Notice contemplates some limited discovery and the possibility of supplementing the record developed before the Board with additional evidence. Specifically, Section IV(E) of the Notice provides in pertinent part:

A party may serve limited informational requests or present additional evidence if the Superintendent finds that the new information or additional evidence is relevant to the issue presented in this proceeding and will not cause repetition or unreasonable delay in the proceeding. Any party that intends to request leave to serve limited informational requests or to present additional evidence shall file a written motion with the Superintendent within ten (10) days after the Dirigo filing is made.... The moving party shall also filed with the motion a detailed statement in the nature of an offer of proof, of the discovery or evidence requested to be taken and the reason it is relevant to the Superintendent's determination. That statement shall be sufficient to permit the Superintendent to make a proper determination as to whether the service of information requests or the taking of

² CAHC's further suggestion that allowing the supplementation of the record here would be consistent with the manner in which the Superintendent handled the Year 1 hearing is utter nonsense. Here, the Board held a full-blown adjudicatory hearing, complete with two days of witness testimony during which the parties were afforded the opportunity to cross-examine, before filing its AMCS determination with the Superintendent. By contrast, in Year 1 the Board held no adjudicatory hearing prior to filing its AMCS determination with the Superintendent. The legality of the Board's failure to provide an opportunity for an adjudicatory hearing in the Year 1 proceeding was challenged before the Superintendent in INS-05-700, and is currently before the Cumberland County Superior Court in AP-05-90.

additional evidence as presented in the motion and offer of proof is appropriate and if so to what extent.

This language was repeated in Section V of the Superintendent's Procedural Order dated June 15, 2006.

Thus, it is not enough for a party to simply state why it wants to serve an information request or to present additional evidence. Rather, the requesting party must submit an offer of proof setting forth detailed information in terms of what the evidence is and how it is relevant to the proceeding. Here, neither the Board nor CAHC comes close to meeting this standard.

Aside from the eight MCRs identified by the Board, the Board presents only the vaguest statements in terms of what it would like to present in terms of additional evidence. The Board states that it would like to present updated data concerning DirigoChoice enrollment, DirigoChoice member surveys, and a MaineCare expansion, and CON determinations, but does not provide any specifics in terms of (1) the time period(s) covered by the data, (2) what the data reveals, (3) when the data was compiled, or (4) why the data was not available on May 10.

More importantly, the Board has made *no* showing as to the relevance of the information it would like to present. Indeed, the Board acknowledges that “[i]t is unknown at this time what effect the additional data will have on the calculation of AMCS.” (Board Motion at 4). If the Board has no idea what effect, if any, the additional evidence would have on the AMCS determination, the Superintendent is in no position to evaluate the relevance or materiality of the evidence to the issues in this proceeding.

The CAHC's motion suffers from the identical infirmities. Although it states that the CMAD Report “will demonstrate that the use of the median as used in Chamber's Exhibit #21 does not provide a reasonable basis upon which to determine savings in CMAD” (CAHC Motion at 2), it provides no information in terms of who prepared the report, when the report was

prepared, or in what manner it undercuts Chamber Exhibit 21. Indeed, given the fact that CAHC states only that it “believes” that DHA currently has such a report in its possession, it would appear that CAHC is not even sure that the CMAD Report actually exists.³ In this regard it is interesting to note that the Board does not seek to supplement the record with such a report.

III. CAHC IS NOT ENTITLED TO A “MULLIGAN.”

The CAHC suggests that supplementation of the record with the alleged CMAD Report is in order because Chamber Exhibit 21 was “given only cursory attention” and “scarcely mentioned” at the hearing, yet the Board placed “substantial reliance” on it in deciding to approve only a fraction of the CMAD savings sought by DHA and Mercer.⁴ (CAHC Motion at 2). *Translation*: “Since we misapprehended the importance of the exhibit at trial and didn’t adequately address it, we want another opportunity to attack it.” CAHC’s motion represents nothing more than a claim to a “Mulligan” for a poor tee shot.

To fully appreciate the absurdity of CAHC’s motion, a review of the record is in order:

1. In its Procedural Order No. 3, the Board set March 10 as the deadline for the parties to designate witnesses and exhibits, and March 13 as the deadline for designating an AMCS methodology. (Record at 42). DHA and CAHC failed to meet each of these deadlines—the Intervenors met them. (Record at 5284).

2. In an Order dated April 28, 2006, the Hearing Officer ordered DHA to supplement its witnesses’ pre-filed testimony by 5:00 p.m. on May 1, and ordered DHA’s expert, Mercer, to supplement its report by 5:00 p.m. on May 2. (Record at 1032-33, 5285-86). Because the Intervenors were getting basic information about DHA’s case less

³ The other information CAHC seeks from DHA by way of an information request would appear to be the very same types of evidence with which the Board seeks to supplement the record.

⁴ DHA and Mercer sought CMAD savings of \$72.7 million. (Record at 1439, 1442, 5242). The Board approved CMAD savings of only \$14.5 million. (Record at 5266, 5294).

than one week before the scheduled start of the hearing, the Hearing Officer's Order provided that "[t]he parties may supplement their pre-filed testimony to a limited extent with direct testimony." (Record at 1033).

3. Counsel for CAHC received Chamber Exhibit 21 on May 8. (Record at 5168).

4. Chamber Exhibit 21 was discussed page-by-page during the direct testimony of the Chamber's expert, John Shiels, on May 10. (Record at 5165-70). As Mr. Shiels testified, the data on which Chamber Exhibit 21 is based is drawn exclusively from spreadsheets provided by Mercer that he received on May 3. (Record at 5165, 5166, 5168, 5172).

5. In response to a question from counsel for CAHC, the Hearing Officer confirmed that Chamber Exhibit 21 was permissible supplemental direct testimony. (Record at 5168).

6. Counsel for CAHC took advantage of his opportunity to cross-examine Mr. Shiels. (Record at 5170-72).

7. DHA and CAHC rested with out seeking to present a rebuttal case. (Record at 5191).

CAHC had plenty of opportunity to attack Chamber Exhibit 21 at the hearing and, whether due to inability, inadvertence, or a conscious tactical decision, failed to do so. Phil Mikelson did not get the benefit of a Mulligan for his tee shot on the 72nd hole of last weekend's U.S. Open, nor should CAHC here.

CONCLUSION

For all of the foregoing reasons, Dirigo Health's Motion for Leave to Present Additional Evidence and CAHC's Motion for Leave to Serve Informational Request and/or Present Evidence should be denied.

Dated: June 21, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that by 3:00 p.m. on June 21, 2006, I served the above filing on the following parties and counsel of record as follows:

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